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# Corporate Manslaughter and the Company Director

Simon Daniels

On the 6th April, 2008, long-awaited legislation came into force, which would change the face of corporate accountability for manslaughter. From sullen grumblings as far back as 1912 in the wake of the Titanic disaster, there has been growing concern that corporate manslaughter directly or indirectly threatens the security or well-being of society, and that it is not safe to leave it to be redressed only by compensation in civil proceedings. Following the failure of the prosecution of the shipowner in the case of the *Herald of Free Enterprise*, the call for a change in the law demanded action and, with the failure of the prosecution of Great Western Trains in the Southall crash, that call became irresistible.

This paper examines the current law of manslaughter from the intimate position of the company director, and the rôle which they have played in the conception and birth of the Corporate Manslaughter and Corporate Homicide Act 2007.

In his paper *The Homicide Ladder in the Modern Law Review*<sup>1</sup>, Victor Tadros states:

When death is caused it is a natural reaction to look around for someone to blame... The fact that our intuitions in attributing blame for death tend not to track the wrongfulness of the killing very accurately provides a powerful reason for the law to differentiate between degrees of wrongdoing more precisely. In distinguishing between different levels of wrongdoing, the law provides public guidance about how we should perceive the killer where it is needed most, where our intuitions, particularly if we are bound up with the deceased, often fail us.

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<sup>1</sup> V. Tadros, (2006) 69(4) MLR 601-618, at 601.

The wrongdoing of manslaughter has historically proved particularly troublesome to establish with clarity, as described famously by Lord Atkin in *Andrews v DPP*<sup>2</sup>:

Of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions... the law ... recognises murder on the one hand based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, but not exclusively, on the absence of intent to kill, but with the presence of an element of 'unlawfulness' which is the elusive factor.

There are two broad categories of involuntary manslaughter: manslaughter by an unlawful and dangerous act, and manslaughter by gross negligence. In both cases, the crime must be addressed according to the elements which characterise it. When considering manslaughter by an unlawful and dangerous act, the mens rea, or mental element, is the intention to do that act and any fault required to render it unlawful. It is irrelevant that the accused is unaware that it is unlawful or that it is dangerous - the test is whether all sober and reasonable people recognise its danger<sup>3</sup>.

Gross negligence manslaughter requires a slightly different test, to establish whether death or serious injury flowed from the accused's gross negligence. A succession of cases over decades exposed the need to define just how evidence of the accused's state of mind should underpin gross negligence, until, in 1995, the case of *R v Adomako*<sup>4</sup> established that the accused can be convicted of gross negligence manslaughter in the absence of evidence regarding his state of mind. Following *Adomako*, the jury needs to consider whether

- the defendant owed a duty of care to the deceased; and
- he was in breach of that duty; and
- the breach of duty was 'a substantial' cause of death<sup>5</sup>; and

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<sup>2</sup> [1937] 2 All ER 552 (at 554-555).

<sup>3</sup> *DPP v Newbury* [1977] 2 All ER 365.

<sup>4</sup> [1995] 1 AC 171.

<sup>5</sup> As refined by *R v O'Connor* [1997] Crim LR p16 CA.

- the breach was so grossly negligent that the accused can be deemed to have had such disregard for the life of the deceased that it should be seen as criminal and deserving of punishment by the state.

In other words, the test must be objective. In the case of *Williams v Natural Health Foods*, Sir Patrick Russell stated<sup>6</sup>

The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the Plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene.

The decision in *Adomako* was not all the own work of the criminal justice system; however, in the absence of some alternative, persuasive authority in criminal law, it drew heavily on the case which defined the modern civil law of negligence. In *Donoghue v Stevenson*<sup>7</sup> the task of defining the law fell to the House of Lords, which held after lengthy deliberation that, in making a claim for damages based on an allegation of another's negligence, the claimant must prove

- a) that the defendant, the party alleged to be negligent, had a duty to the injured party to avoid acts or omissions which might cause him loss or damage – that is, the duty of care;
- b) that the defendant was in breach of that duty of care generally by showing that his conduct fell below the reasonably expected standard to be met by such persons in those circumstances; and
- c) the claimant must have suffered damage as a reasonably foreseeable consequence of the defendant's breach of duty.

The yawning gap between civil and criminal liability was, and remains, the burden of proving the essential elements: in civil proceedings, the claimant must establish their case on the balance of probabilities; in a criminal case, the prosecution must prove to the jury that all the elements of the crime have been proved beyond reasonable doubt. This can very

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<sup>6</sup> *Williams and Another v Natural Life Health Foods Ltd* [1998] 1 WLR 830.

<sup>7</sup> [1932] All ER Rep 1; [1932] AC 562; HL.

conveniently be illustrated in the recent case, *R v Hubble*<sup>8</sup>, in which the defendant, Second Officer on the P & O Ferry, *Pride of Bilbao*, pleaded not guilty to three counts of manslaughter, alleged to have taken place between the 20th and 24th August 2006. The prosecution had to prove beyond reasonable doubt that, by his gross negligence, Mr Hubble, when officer of the watch, did not take sufficient steps to avoid the looming situation warned by the look-out, that he failed to proceed on the basis that there might have been a collision, and that he took no steps to stop or inform rescue services. As the evidence unfolded, negligence might have been established on the balance of probabilities, but not beyond reasonable doubt. The jury returned a verdict of not guilty.

In the case of Mr Hubble, the verdict gave the accused cause to breathe a sigh of relief. The element of the yawning gap between civil and criminal liability in negligence, however, which gives growing cause for concern, was highlighted very starkly in the case of Captain Wolfgang Schröder. In March 2006, Captain Schröder was in command of the *Zim Mexico III* when she collided with a port-side crane at Mobile, Alabama. The consequence was the death of a dock-worker, following what mariners worldwide believed to be a mere error of judgment. Captain Schröder was indicted for homicide and the jury convicted him, and he faced a sentence of imprisonment of up to 16 months. At his sentencing, Judge Grenade noted that the law required jurors to find that Schröder was guilty of simple negligence, a lower standard more commonly associated with civil disputes. She concluded: “While I certainly do not discount the terrible consequences that have resulted from this negligence, what he has been convicted of is really a civil offence.”<sup>9</sup>

Judge Grenade accurately identified the weakness in determining guilt in a criminal trial according to the standards demanded of a law, the modern origins of which are founded on a claim for compensation arising out of a snail in a bottle of ginger beer. This appraisal surely underlines the wisdom of Sir Carleton Allen when he expressed his view of the purpose of the criminal law:

Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of

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<sup>8</sup> [2007] The Crown Court Winchester (currently unreported).

<sup>9</sup> *United States of America v Wolfgang Schröder* [2007] United States District Court, Alabama Southern District (currently unreported).

society, and because it is not safe to leave it redressable only by compensation of the party injured.<sup>10</sup>

Mimicking a scene from *The Emperor's New Clothes*, precious little word of caution has followed the application of the civil principles of negligence through Adomako and *O'Connor* to the criminal arena; but Judge Grenade may have articulated a new argument in this context.

That said, having established the parameters of manslaughter by an individual under current law, let us put this in the context of the liability of a company director. In *Ivory v Anderson*<sup>11</sup>, Hardie Boys J expressed obiter that a director is not personally liable for the torts committed on behalf of the company because of the effect of the company's separate existence and the doctrinal process by which the company acts. The decision in *Williams v Natural Life Health Foods*<sup>12</sup> clarified the law that, in order to establish the personal liability of a director or employee, there had to have been such an assumption of personal responsibility by him as to create a special relationship between him and the claimant; that, in determining whether there had in law been such an assumption, an objective test was to be applied, the primary focus being on things done or said by the defendant or on his behalf and the question being whether the claimant could reasonably have relied, and had relied, on an assumption of personal responsibility by him.

Until very recently, the assumption of personal responsibility implied an obligation arising out of consent, rather than one imposed by law, which Harrison argued, logically, must originate from the director's contract of employment, requiring the physical undertaking of an obligation to undertake such steps as to observe a duty of care<sup>13</sup>. Indeed it was this upon which liability in criminal law turned for the directors of the owning company of the Herald of Free Enterprise.

The background and the facts of this case demand some attention in depth. The Herald of Free Enterprise was one of three sisters, a modern roll-on/roll-off (ro-ro) passenger/vehicle ferry grossing 7,950 tons, and one of the largest vessels of her type when she left her German builders in 1980.

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<sup>10</sup> C K Allen, *Legal Duties and other Essays in Jurisprudence* (The Clarendon Press, Oxford, 1931).

<sup>11</sup> *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517; followed in *Re Supply Ready Mix Concrete (No 2)* [1995] 1 AC 456.

<sup>12</sup> [1998] 1 WLR 830.

<sup>13</sup> See R Grantham and C Rickett, 'Directors and Tortious Liability: Contract, tort and Company law' (1999) 62 MLR, 133. See also K Harrison, 'Manslaughter by Breach of Employment Contract', 1992 21(1) *Industrial Law Journal*, 31-43.

She had been designed at a time when her owners, Townsend Thoresen, knew that every second and every penny counted in the cut-throat competition on the English Channel. Indeed, so thorough had her design concept been, that the linkspans at either end of her planned service, between Dover and Calais, were especially built to match the levels of the ship's car decks, in order to enable simultaneous loading of both decks and thus minimise the time required for turn-around in port.

The competition just carried on growing in the English Channel, one of the most crowded seaways in the world – and the Dover-Calais run was the most competitive crossing, because it was the shortest – just 22 miles long. While the United Kingdom's (UKs') growing trade with the European Community undoubtedly contributed to the rising demand, competition was heating up, thanks to a number of factors. In July 1984 the UK Government announced the privatisation of the former State-owned ferry operator Sealink, which would exert yet more pressure on the competitiveness of the rival ferry operators on the route. Then, in 1986, after generations of aborted attempts to initiate a tunnel project, and in the face of bitter opposition from the ferry operators, the French and British governments finally gave the go-ahead to build the Channel Tunnel.

In the face of these factors, the board rooms of ferry operators had to consider how best to conduct their prime function: to maximise a yield for their investors. It was against this background that P & O European Ferries had to make some bold business decisions. As a short-sea shipping company, it had a hugely successful tradition, making the most of a subsidiary, the General Steam Navigation Company, which had been so successful in European trading that P & O had acquired the controlling interest in the Company and when, in the 1960s, the pattern of Channel business was evolving, P & O backed General Steam in a business venture which evolved into P & O European Ferries.

By the summer of 1986, the board room of P & O Ferries was thinking hard about its long-term strategy in order to retain its position in the marketplace and satisfy the shareholders. This was the sum of the directors' concerns; safety management was not among their job descriptions. It was surely no coincidence that, at about this time, it resolved to buy out its rival, Townsend Thoresen, reducing the competition and spreading the overheads. In February of the following year the deal was completed and the directors of P & O Ferries implemented their plans for maximising the financial yield.

Their own ferries on the Dover-Calais route were doing their job very satisfactorily; they did not need Townsend's tonnage there, so it was decided to switch the Herald of Free Enterprise to the Zeebrugge route. The only

problem was that the linkspans at Zeebrugge had not been designed with the Herald in mind so that, for the vessel's upper vehicle deck to be accessed by the ramp, it was necessary to trim the ship by the head and flood her ballast tanks to lower the level of the vehicle deck to the linkspan.

When the Herald left Zeebrugge on the 6<sup>th</sup> March 1987, not all the water had been pumped out of the bow ballast tanks, causing her to be some three feet down at the bow. Mr Stanley, the assistant bosun, was responsible for closing the bow doors but he had been released from duties by the bosun before the sailing time. He duly went to his cabin and fell asleep; tragically, he slept through the 'Harbour Stations' call which ordered the crew to their assigned sailing positions. It was not part of anybody else's duties to ensure that the bow doors were closed before sailing, save the overriding duty of the Master to ensure that the vessel was in all respects safe to proceed to sea. Her design of her clamshell bow doors made it impossible for Captain David Lewry to see from the bridge if the doors were opened or closed, though.

The Herald sailed at 7.05pm local time, with a crew of 80 and some 459 passengers, 81 cars, three buses, and 47 trucks. Passing the outer mole 19 minutes later, she increased speed, when a bow wave began to build up under her prow. At 15 knots, with the bow down three feet lower than normal, water began to break over the main car deck through the open doors at the rate of 200 tons per minute.

In common with other ro-ro vessels, the *Herald's* main vehicle deck lacked transverse bulkheads and, so, the sudden flood of water through the bow doors quickly caused the vessel to become unstable. The Herald listed 30 degrees to port almost instantaneously, as water continued to pour in and fill the port wing of the vehicle deck, causing her to capsize 40 seconds later. The Herald settled on the sea bed at slightly more than 90 degrees with the starboard half of her hull above water. There had been no chance to launch any of the ship's lifeboats.

At least 150 passengers and 38 members of the crew lost their lives when the vessel capsized, the worst peacetime disaster involving a British vessel since the sinking of the Titanic in 1912. In accordance with the provisions of the Merchant Shipping Act (at that time, the 1894 Act), a Formal Investigation was conducted by Mr Justice Sheen<sup>14</sup>, whose findings included inter alia;

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<sup>14</sup> mv HERALD OF FREE ENTERPRISE. *Report of Court No. 8074*, Formal Investigation (July 1987).



At first sight the faults which led to this disaster were the aforesaid errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also the failure by Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the Herald ought to have been organised for the Dover-Zeebrugge run.

All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness.

While the judge criticised the directors in the most scathing terms possible (the final sentence in this quotation has not ceased to ring in the ears of ship operators ever since), the same words, paradoxically, became the directors' salvation. The fact that the evidence led to the conclusion that the directors had not appreciated their responsibility for the safe management of their ships, that they had not applied their minds to the question of safety and their lack of comprehension of what their duties were, showed that no director had assumed any personal responsibility which underpinned a duty of care and, in the absence of that, there could not be any realistic prospect of a conviction for manslaughter against a director.

It has been this issue which has characterised the long catalogue of failed prosecutions for corporate manslaughter. The concept of corporate personality is often traced by modern authors to the decision in *Saloman v Saloman*<sup>15</sup>, but in fact, the existence of corporate personality has been traced back to ancient Rome.<sup>16</sup> The two essential features of a business, incorporated under law, are its independent legal personality, meaning that it can own property, sue and be sued in its own name; and the members'

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<sup>15</sup> *Saloman v A Saloman & Co Ltd* [1897] AC 22.

<sup>16</sup> H Hansmann, R Kraakman and R Squire, 'Law and the Rise of the Firm', (2006) 119 *Harvard LR*, 1333, 1356-1364.

liability is limited to the amount unpaid on shares held by them<sup>17</sup>. As a separate legal entity, it is the company which will be sued and, unless the director positively abandoned the shield of the company's separate personality, personal liability does not arise even where the director has physically committed the tortious act.<sup>18</sup>

The test of whether a company is guilty of manslaughter or not has, until April 2008, been intrinsically linked to whether or not a director or senior manager of the company – part of the 'controlling mind and will' of the company – is guilty of manslaughter. If the director is found guilty, the company is guilty; if the director is found not guilty, the company will be not guilty. This is known as the 'identification' doctrine, the test for which was described in *HL Bolton v Grahams & Sons Ltd*<sup>19</sup>:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hand to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

There was, however, uncertainty about how this general test could be applied. In the House of Lords case, *Tesco Supermarkets Ltd v Natrass*,<sup>20</sup> three different judges gave three slightly different interpretations of who could be defined in the controlling mind. Lord Reid stated that the following individuals were controlling minds of a company: the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company. Viscount Dilhorne gave a more limited interpretation saying that a controlling mind is a person

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<sup>17</sup> H Hansmann & R Kraakman, *What is Corporate Law?* (2004), referred to by R Grantham in 'The Limited Liability of Company Directors', (2007) LMCLQ at p 362.

<sup>18</sup> *Ibid.*

<sup>19</sup> [1957] 1 QB 159.

<sup>20</sup> [1972] AC 153 (HL).

[w]ho is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders.

Further, Lord Diplock stated that the people who are the controlling minds are those

who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company.

Mr Justice Taylor had to wrestle with the concept of the controlling mind in the ensuing prosecution of P & O Ferries in the Herald case<sup>21</sup>, when he stated;

Where a corporation, through the controlling mind of one of its agents, does an act which fulfils the pre-requisites for the crime of manslaughter, it is properly indictable for the crime of manslaughter.

The prosecution was doomed to fail. After a half-time submission, the judge ruled that the prosecution was not in a position to satisfy the 'doctrine of identification'.

This now established itself as the stumbling block for prosecutions in corporate manslaughter. In the trial of Great Western Trains<sup>22</sup> over the Southall Train disaster, the Crown tried to argue that the doctrine no longer applied and that it was possible to consider the conduct of the 'company' as a whole rather than the conduct of an individual 'controlling mind'. The trial judge, however, ruled against him, and his decision was upheld by the Court of Appeal, stating that <sup>23</sup> 'the identification principle remains the only basis in common law for corporate liability for gross negligence manslaughter'.

The Law Commission presented a report with recommendations, parts of which the Government embraced<sup>24</sup>, which culminated in the Corporate

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<sup>21</sup> R v P & O European Ferries (Dover) Ltd [1991] 93 Cr App R 72.

<sup>22</sup> R v Great Western Trains. See The Times, 3 July, 1999.

<sup>23</sup> Attorney General's Reference No 2/1999.

<sup>24</sup> See Reforming the Law on Involuntary Manslaughter: The Government's Proposals (Home Office, May, 2000, CC NO77828), pp 30-36).

Manslaughter and Corporate Homicide Act 2007, which came into effect on the 6<sup>th</sup> April 2008. Section 1(1) defines the new offence, which, Parliament has emphasised, builds on key aspects of the common law offence of gross negligence manslaughter; but it now abolishes the old requirement demanded by the identity doctrine and depends on a finding of gross negligence in the way in which the activities of the organisation are run.

In summary, the offence is committed where, in particular circumstances, an organisation owes a duty to take reasonable care for a person's safety and the way in which activities of the organisation have been managed or organised amounts to a gross breach of that duty and causes the person's death. How the activities were managed or organised by senior management must be a substantial element of the gross breach.<sup>25</sup>

Crucially, this Act is intended to pursue corporate accountability. Parliament did not intend that an individual be prosecuted under the Act and, hence, if an individual director is to be prosecuted, it will still be a common-law offence to answer - if necessary, in parallel with proceedings against the corporate entity under the statute. Of course, the success of the new Act in facilitating corporate convictions by circumventing the old identification doctrine remains to be tested.

That said, it will not be lost on readers that the author stated; 'Until very recently, the assumption of personal responsibility implied an obligation arising out of consent'. The Companies Act 2006 has changed somewhat just what can be implied with clarity in the director's contract of employment, setting in stone on a statutory basis, the former common-law principles which had evolved through case law. Section 170 makes it very clear that a director owes to a company a number of general duties, as qualified in subsections 3 and 4:

- The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
- The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to

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<sup>25</sup> Ministry of Justice Notes for Guidance, 2007.

the corresponding common law rules and equitable principles in interpreting and applying the general duties.

This must be applied to Section 174, which defines the duty to exercise reasonable care, skill and diligence:

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with-

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has.

It therefore follows that the director's duties, having been codified by statute, will, without doubt of any interpretation, be incorporated - at the very least as implied terms - into the contract of employment. The downstream consequences must be considered:

1. The duty of care must logically extend to cover acts or omissions which could cause the company loss or damage.

2. As a result, the scenario can well be envisaged in which a director may not be convicted of manslaughter but the company may be convicted under the 2007 Act as well as under the Health and Safety at Work Act 1974 and its statutory instruments.

In that case, a conviction under any such legislation may lead not only to dismissal but also to claims for compensation by the company. In view of the value to claimants under civil law, of a conviction which can be adduced in evidence of liability against the company, the new legislation raises the profile, once again, of the director's exposure to accountability under their contract of employment, for the vicarious liability which they have thrust upon their employer by reason of their acts or omissions, as held obiter by Lord Thankerton in *Canadian Pacific Railway Co v Lockhart*<sup>26</sup>:

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<sup>26</sup> [1942] AC 591.

It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master ... is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them.

The 2006 Act no longer leaves the director's accountability to the company in very much doubt and the spectre of *Lister v Romford Ice* looms large. In that case it was held that an employer may be liable in a claim for compensation under civil law for his employee's breach even though it constitutes a crime. Their Lordships qualified this in the context of the employee's contractual duties; that a term will not be implied into a contract at common law unless it satisfies the requirement of certainty, under the general principle that an implication must be precise and obvious<sup>27</sup>. The requirement of certainty has been satisfied by virtue of the provisions of Chapter 2 of the Act.

Any conclusion on Corporate Manslaughter and the Company Director must focus on the management of risk. Of course, no commercial venture is risk-free, and the eternal truth of business management is that directors must balance the chances of an event occurring against the consequences of it occurring. After all, it is generally the high-risk scheme which attracts the investors: such schemes can collapse expensively but, if they succeed, they promise the greatest reward to the company's shareholders. Life can be much more complicated than that, of course, if the director is to keep the shareholders satisfied: consider the case of the Ford Pinto.

The late 1960s were proving to be troubled times for the makers of large American motor cars, not least because of a looming global recession and the effect which crude prices had on the demand for motor cars in the United States. Manufacturers had to re-think their business strategies and plan for cars which satisfied the changing demand; failure to get the strategy right would inevitably result in declining market-share and a declining share price for the company. It was, of course, top of the list of the directors' duties to guard against such ills and so, in 1968, Ford approved the concept of their new 'subcompact' family car, the Pinto. It was only after the company was fully committed to production, though, that an engineer pointed out to them that the new design posed a serious risk in a collision, for the fuel

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<sup>27</sup> *Lister -v- Romford Ice and Cold Storage Co. Ltd* [1957] 1 All ER 125; [1957] AC 555; [1956] UKHL 6.

installation, crushed into such a confined space, presented a high risk of a fire which could kill or maim the occupants.

The Ford directors did not panic, but calmly assessed the risk, and ordered a cost-benefit analysis. As a result, they were able to establish some forecasts which, admittedly, in the cold light of day, combine to draw a shocking picture of the consequences of making Board decisions without regard to ethical practices:

- The Pinto would probably cause 180 burn deaths, 180 serious burn injuries, and 2,100 burned vehicles, resulting in civil claims, based on the quantum of claims in contemporary cases, of \$200,000 per death, \$67,000 per injury, and \$700 per vehicle, making a total of \$49.5 million.
- On the other hand, the costs for installing safety features would cost some \$11 per Pinto, which would give a total bill of some \$137.5 million.

As a result, the directors took the management decision to tolerate the risk, which, based on the arguments in the cost-benefit analysis, of course made financial sense. It also satisfied the legal definition of recklessness, famously held by Lord Diplock, that a defendant is reckless when (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged; and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.<sup>28</sup>

In May 1972, Mrs Gray was at the wheel of her six-month old Pinto in California, with 13-year old Robert Grimshaw as a passenger. As a result of a rear-end collision, Mrs Gray died from her injuries; Robert Gramshaw survived, but with shocking personal injuries, just as the engineer had predicted. At the trial of his civil claim against Ford<sup>29</sup>, the jury held against the company and awarded total damages exceeding \$128 million, most of which consisted of punitive damages, to reflect the jury's condemnation of the recklessness of the Board's decision.

Although the quantum of punitive damages in the United States has been reduced dramatically by a succession of judicial decisions in recent

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<sup>28</sup> R v Caldwell (1982) 1 AER 961.

<sup>29</sup> Grimshaw v. Ford Motor Company (1981) 119 Cal App 3d 757.

years, the core issue so relevant to this paper is clear: the management by directors of risk can be a crucial factor in determining whether the company's activities are managed or organised in such a way as to cause a person's death, amounting to a gross breach of a relevant duty of care owed by the company to the deceased. This mirrors the provisions of Section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007.

In conclusion, therefore, despite the statutory abandonment of the identification principle, the director has a pivotal rôle in the company's liability, for the way in which they manage the business of risk and, although the new Act does not extend personal accountability to the director, the very fact of their employment as a director can hold them accountable to the company by virtue of the provisions of the 2006 Act.

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